Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1407

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION,
Petitioner,

v.

ST. LOUIS COUNTY NATIONAL BANK, CLAYTON TRUST COMPANY and WILLIAM R. KOSTMAN, Director of the Division of Finance for the State of Missouri.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Clayton Trust Company in Opposition to Petition for Certiorari

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OPINIONS BELOW

The opinion of the Court of Appeals was filed on December 16, 1976; petitions for rehearing were denied on January 31, 1977. The opinion of the Court of Appeals is reported in 548 F. 2d 716; the opinion of the District Court is reported in 420 F. Supp. 510. Both are appended to the petition.

JURISDICTION

This respondent does not question the jurisdiction as set forth in the petition.

STATUTES INVOLVED

Federal Statutes: 12 U.S.C. § 36(c); 12 U.S.C. § 36(f); 12 U.S.C. § 92a.

Pertinent parts of these statutes are quoted in the petition. Sec. 92a is set out in full in the appendix to this brief.

Missouri Statutes: Vernon's Annotated Missouri Statutes. Sec. 362.105-1(1):

". . .; provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107;"

Sec. 362.107-5:

"Nothing contained in this section shall be deemed to authorize the maintenance or operation of a branch bank or a branch trust company in contravention of the prohibition contained in section 362.105."

Sec. 362.107-6:

"National banking associations located in this state have the same but no greater right under or by virtue of this section as banks and trust companies organized under the laws of this state."

QUESTIONS PRESENTED

1. Whether the doing of trust business by petitioner at its trust office in the City of Clayton, Missouri, eight miles distant from its main banking office and trust department in St. Louis, Missouri, makes the Clayton office a "branch" within the meaning of 12 U.S.C. § 36?

2. Whether the conduct of trust business at petitioner's trust office in Clayton, in addition to its main trust office in St. Louis, is a violation of 12 U.S.C. § 92a because Missouri statutes prohibit a state bank or a state trust company from having more than one office for carrying on trust business with the public?

STATEMENT OF THE CASE

The statement of the case in the petition is satisfactory with these additions.

The Comptroller of the Currency took a separate appeal from the judgment of the District Court in this case. His appeal was docketed in the Court of Appeals as No. 76-1709 and consolidated with the appeal by Merçantile, No. 76-1603. The opinion of the Court of Appeals decided both appeals and the orders entered on January 31, 1977 denied the separate petitions of Mercantile and of the Comptroller for rehearing. The Comptroller has not asked this Court to review the judgment below.

The Missouri statutes which prohibit a branch bank or trust company, V.A.M.S. Secs. 367.105-1(1) and 362.107-5, have been held to prohibit a Missouri bank or trust company from exercising its fiduciary powers at more than one place of business.

St. Louis Union Trust Company v. Pemberton, 494 S.W. 2d 408 (Mo. Ct. App., 1973).

ARGUMENT

The writ should be denied for the following reasons:

1. The decision below is not in conflict with the decision of any other Court of Appeals or of this Court on the questions presented.

2. The Comptroller of the Currency is a party in the case in the Court of Appeals. He has not filed a petition for certiorari in this Court and the time for doing so has expired. The Comptroller has statutory responsibility for supervision of national banks and administration of the national banking laws (12 U.S.C. §1 et seq.). If the Comptroller has a serious concern that the result reached by the Court of Appeals would affect adversely his proper administration of the national banking laws he would be expected to seek a review of the decision. His failure to do so suggests that in his opinion the decision below will not have a harmful impact on the activities of national banks or on his ability to discharge the duties of his office.

The absence of the responsible government officer from the case at this stage undercuts petitioner's argument that an important federal question has been decided wrongly.

3. The decision below finds that the operation of multiple trust offices by petitioner (a national bank) violates two separate sections of the national banking laws: §36, as to the conditions upon which a national bank may establish a branch, and §92a, as to the application of state law to the exercise of trust powers by a national bank. Although the holding on the §36 "branch" issue is well within the principles enunciated by this Court in *First National Bank v. Dickinson*, 396 U.S. 122 (1969), and *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966), the result reached by the

Court of Appeals is sustained independently by reason of the §92a violation.

The principle of federal law involved in the §92a ruling is clear, requiring no new review by this Court to be settled. The policy of competitive equality between state and national banks is incorporated into §92a by its application of non-discriminatory state regulations to the conduct of trust business by national banks within the state. The policy is found in the express language of the statute and is recognized by court decisions, by administrative regulations, by other parts of §92a and by its legislative history.

Court Decisions:

First National Bank of Bay City v. Fellows, 244 U.S. 416 (1917);

New Hampshire Bankers Association v. Nelson, 460 F.2d 307 (1 Cir. 1972), cert. den. 409 U.S. 1001 (1972);

Blaney v. Florida National Bank at Orlando, 357 F.2d 27 (5 Cir. 1966);

American Trust Company, Inc. v. South Carolina State Board of Bank Control, 381 F. Supp. 313 (D.C., S.C. 1974).

Administrative Regulations:

The statutory policy of competitive equality in the exercise of trust powers, upheld by the Court of Appeals in this case, is confirmed by the Comptroller's own regulations which he promulgates under the authority of 12 U.S.C. §92a (j) to control "the proper exercise of the powers granted" to national banks by §92a. A number of those regulations use the state or local law as the *measure* of the extent of authority or restric-

tion contained in the federal regulation for exercise of fiduciary powers by a national bank. See 12 C.F.R., Secs. 9.1(d), 9.3(a), 9.10(b), 9.11(a), 9.14, 9.15 and others.

Other Parts of §92:

Other subsections of §92a incorporate particular provisions of state law to apply to the exercise of trust powers by national banks, such as subsections (f), (g) and (i).

Legislative History:

House Report 479, 65th Congress, Second Session, April 9, 1918, which describes the 1918 amendments to Sec. 11 (k) of the Act (now § 92a), states:

> "These provisions are intended to impose safeguards upon the exercise of these fiduciary powers by national banks, and to have national banks in the exercise of those powers conform as fully as is practicable with State requirements."

The district court decision quoted by petitioner, *Continental Illinois Bank and Trust Co. N.A. v. Lignoul*, is consistent with the decision below on the § 92a question. The district judge, in ruling that the national bank in Illinois could move its entire trust department to a separate location from its banking house, found that Illinois law allows state trust companies to have multiple branches or offices for trust business. The ruling recognizes that in Illinois a separate trust office is not in contravention of state law, so the policy of competitive equality gives the same right to the national bank in Illinois. In contrast, Missouri law does not permit state banks or trust companies to have multiple offices for trust business. National banks in Missouri must conform with this non-discriminatory state requirement.

CONCLUSION

The construction placed on § 92a by the court below is consistent with the plain meaning of the statute, and with its dominant purpose to maintain competitive equality between national and state banks in the conduct of trust business. This purpose has been followed without conflict in authority by the federal courts and by the administrative regulations of the Comptroller. Further review by this Court is not warranted.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Text of 12 U.S.C. § 92a

12 U.S.C. § 92a:

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

(c) National banks exercising any or all of the powers enumerating[1] in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

(d) No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks,

drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

(e) In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

(f) Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law. National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the State.

(g) In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

(h) It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more

than five years, or may be both fined and imprisoned, in the discretion of the court.

(i) In passing upon applications for permission to exercise the powers enumerated in this section, the Comptroller of the Currency may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to him proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

(j) Any national banking association desiring to surrender its right to exercise the powers granted under this section, in order to relieve itself of the necessity of complying with the requirements of this section, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Comptroller of the Currency a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller of the Currency, after satisfying himself that such bank has been relieved in accordance with State law of all duties as trustee, executory, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or other fiduciary, under court, private or other appointments previously accepted under authority of this section, may, in his discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this section. Under the issuance of such a certificate by the Comptroller of the Currency, such bank (1) shall no longer be subject to the provisions of this section or the regulations of the Comptroller

of the Currency made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers granted by this section without first applying for and obtaining a new permit to exercise such powers pursuant to the provisions of this section. The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein. Pub. L. 87-722, § 1, Sept. 28, 1962, 76 Stat. 668.